

N:\Pro - Se\6.26.2007\04-0348 Sibley348_service.wpd

DISCUSSION

A. Review Pursuant to 28 U.S.C. § 1915A

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

B. Legal Claims

Plaintiff claims that defendant Meyer used excessive force when he continued to pepper-spray plaintiff even after the latter had complied with Meyer's orders to face the wall. Plaintiff claims that he suffered injury to his eyes from the "excessive chemical spray attack and a spine/shoulder injury from the intentional retaliatory brutal physical handling." (Pet. 8.) Liberally construed, the Court finds plaintiff's claim cognizable as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

C. Defendant R. D. Wysinger

To state a claim under § 1983, a plaintiff must set forth specific facts as to each individual defendant's conduct that proximately caused a violation of his rights. Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988). Plaintiff has not set

1 forth any factual allegations as to defendant Wysinger's conduct which proximately
 2 caused plaintiff injury. Plaintiff states that defendant Wysinger sprayed another
 3 inmate who was present at the time of the incident, but does not allege that
 4 Wysinger did anything to violate plaintiff's rights. Furthermore, plaintiff does not
 5 have standing to complain about the deprivations of the constitutional rights of
 6 others. See Powers v. Ohio, 499 U.S. 400, 410 (1991)

7 D. Motions for Appointment of Counsel

8 Plaintiff's motions for appointment of counsel (Docket Nos. 13 & 14) are
 9 denied for lack of exceptional circumstances. See Terrell v. Brewer, 935 F.2d 1015,
 10 1017 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986).

11 **CONCLUSION**

12 For the reasons stated above, the Court orders as follows:

- 13 1. Plaintiff's claims against R. D. Wysinger are DISMISSED for
 14 failure to state a cognizable claim for relief.
- 15 2. Plaintiff's motions for appointment of counsel (Docket Nos. 13 & 14)
 16 are DENIED.
- 17 3. The clerk of the Court shall issue summons and the United States
 18 Marshal shall serve, without prepayment of fees, a copy of the complaint in this
 19 matter, all attachments thereto, and a copy of this order upon **Correctional Officer**
 20 **M. Meyer**. The clerk shall also mail courtesy copies of the complaint and this order
 21 to the California Attorney General's Office.
- 22 4. No later than **ninety (90) days** from the date of this order, defendants
 23 shall file a motion for summary judgment or other dispositive motion with respect to
 24 the claims in the amended complaint found to be cognizable above.
- 25 a. If defendants elect to file a motion to dismiss on the grounds
 26 plaintiff failed to exhaust his available administrative remedies as required by 42
 27

U.S.C. § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810 (2003).

b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If any defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date the summary judgment motion is due.**

5. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on defendants no later than **thirty (30) days** from the date defendants' motion is filed.

a. In the event the defendants file an unenumerated motion to dismiss under Rule 12(b), plaintiff is hereby cautioned as follows:¹

The defendants have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or documents, that contradict the facts shown in the defendant's declarations and documents and show that you have in fact exhausted your claims. If you do not submit your own evidence in opposition, the motion to dismiss, if appropriate, may be granted and the case dismissed.

b. In the event defendants file a motion for summary judgment, the Ninth Circuit has held that the following notice should be given to plaintiffs:

¹ The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial.

See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary judgment may be deemed to be a consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

6. Defendants shall file a reply brief no later than **fifteen (15) days** after plaintiff's opposition is filed.

7. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

8. All communications by the plaintiff with the Court must be served on

1 defendants, or defendants' counsel once counsel has been designated, by mailing a
2 true copy of the document to defendants or defendants' counsel.

3 9. Discovery may be taken in accordance with the Federal Rules of Civil
4 Procedure. No further court order is required before the parties may conduct
5 discovery.

6 10. It is plaintiff's responsibility to prosecute this case. Plaintiff must
7 keep the court informed of any change of address and must comply with the court's
8 orders in a timely fashion. Failure to do so may result in the dismissal of this action
9 for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

10 11. Extensions of time are not favored, though reasonable extensions will
11 be granted. However, the party making the motion for an extension of time is not
12 relieved from his or her duty to comply with the deadlines set by the Court merely
13 by having made a motion for an extension of time. The party making the motion
14 must still meet the deadlines set by the Court until an order addressing the motion
15 for an extension of time is received. Any motion for an extension of time must be
16 filed no later than the deadline sought to be extended.

17
18
19 DATED: June 19 2007


20 JAMES WARE
United States District Judge